Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-586

UNITED PENTECOSTAL CHURCH OF HODGE, LOUISIANA,
Petitioner,

versus

THE STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HIGHWAYS,
Respondent.

and

MALCOLM D. WHITMAN,
Petitioner,

versus

THE STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HIGHWAYS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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No.

UNITED PENTECOSTAL CHURCH OF HODGE, LOUISIANA,
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The UNITED PENTECOSTAL CHURCH OF HODGE, LOUISIANA and MALCOLM D. WHITMAN, respectfully pray that a writ of certiorari issue to

review the judgments of the Second Circuit Court of Appeals of the State of Louisiana on which judgment the Supreme Court of the State of Louisiana denied writs of certiorari on September 19th, 1975, and September 25th, 1975, respectively.

OPINIONS BELOW

In the case of State of Louisiana, through the Department of Highways vs. United Pentecostal Church of Hodge, Louisiana, the original opinion of the Second District Court of Louisiana was rendered by Judge David T. Caldwell on the 21st of June, 1974, bearing Docket Number 14,627, with written reasons for judgment, a copy of which reasons and judgment are attached hereto and made a part hereof and are appended to this petition in the appendix at page number 1a. The case was appealed to the Court of Appeal for the Second Circuit of the State of Louisiana, bearing Docket Number 12,550. Judgment was rendered by that Court on June 3rd, 1975 with written reasons for judgment, a copy of which is attached hereto and appended to this petition in the appendix at page number 11a. The Second Circuit Court of Appeals denied the application of the United Pentecostal Church of Hodge, Louisiana, for rehearing on July 1st, 1975, as per copy attached hereto and appended to this petition in the appendix at page number 30a. An application for writs of certiorari was made to the Supreme Court of the State of Louisiana and that application was denied by the Louisiana Supreme Court on September 19th, 1975, copy of which is attached hereto at page 31a of the appendix.

In the case of State of Louisiana, through the Department of Highways vs. Malcolm D. Whitman, an expropriation suit was filed by the State of Louisiana in the Second Judicial District Court of Louisiana, in Jackson Parish and judgment was rendered on the trial of the matter by Judge David T. Caldwell on the 26th day of June, 1974, with written reasons for judgment assigned. A copy of that judgment and the reasons is attached hereto and appended to this petition in the appendix at page number 32a. The State of Louisiana appealed to the Second Circuit Court of Appeals of Louisiana and judgment was rendered on the appeal on June 3rd, 1975 with written reasons attached, a copy of which is attached to this brief in the appendix at page number 39a. Application for rehearing was filed on behalf of Malcolm D. Whitman and was denied by the Second Circuit Court of Appeals of Louisiana on July 1st, 1975, a copy of which is attached to this petition in the appendix at page number 53a. Application was made to the Louisiana Supreme Court for writs of certiorari and was denied on September 25th, 1975, and a copy of the denial is attached to this petition in the appendix at page number 54a.

JURISDICTION

In the instant case, as in every case in which a sovereign exercises its right of eminent domain, the issue of just compensation is central. The right of just compensation as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States is at issue in these cases. The reduction by the Louisiana Appellate Court of expert fees as an

element of just compensation is the central issue before this Honorable Court in both cases. Certiorari has been denied by the highest Court of the State of Louisiana, and therefore, it is submitted that this Honorable Court should take jurisdiction and consider whether the petitioners' rights to just compensation and due process of law under the Fifth and Fourteenth Amendments to the United States Constitution have been violated by the State of Louisiana. This Court's jurisdiction is invoked under Amendments Five and Fourteen to the Constitution of the United States of America.

QUESTIONS PRESENTED BELOW

After adjudication of the amount of just compensation at the trial level, the following issues were argued in the Louisiana Court of Appeal and in the Application for Writs of Certiorari to the Louisiana Supreme Court:

In the case of State of Louisiana, through the Department of Highways vs. The United Pentecostal Church of Hodge, Louisiana:

1. THE FAILURE OF THE COURT OF APPEAL OF LOUISIANA TO DISMISS THE APPEAL OF THE STATE OF LOUISIANA IN THAT COURT.
2. THE REDUCTION OF THE AMOUNT AWARDED AS VALUE OF THE LAND TAKEN BELOW $1.40 PER SQUARE FOOT.

3. THE REDUCTION OF THE AMOUNT OF SEVERANCE DAMAGES AWARDED BY THE TRIAL COURT.
4. THE REDUCTION OF THE AMOUNT OF EXPERT WITNESS FEES AWARDED BY THE TRIAL COURT IN THE COURT OF APPEAL OF LOUISIANA.

In the case of State of Louisiana, through the Department of Highways vs. Malcolm D. Whitman:

1. THE FAILURE OF THE COURT OF APPEAL OF LOUISIANA TO DISMISS THE APPEAL OF THE STATE OF LOUISIANA IN THAT COURT.
2. THE REDUCTION BY THE COURT OF APPEAL IN THE AMOUNT OF JUST COMPENSATION AWARDED FOR IMPROVEMENTS LOCATED ON THE SUBJECT PROPERTY.
3. THE REDUCTION BY THE COURT OF APPEAL OF LOUISIANA IN THE AMOUNT OF EXPERT WITNESS FEES WHICH WERE ASSESSED BY THE TRIAL COURT IN THE MATTER.

QUESTIONS PRESENTED HERE

Only the question of expert witness fees is brought before this Honorable Court as an element of due process of law and just compensation under the Fifth

and Fourteenth Amendments to the Constitution of the United States of America, to-wit:

DOES THE REDUCTION OR TOTAL DISALLOWANCE OF AN ASSESSMENT OF COSTS AGAINST THE EXPROPRIATING AUTHORITY, WHEN THE DEFENDANT LANDOWNER IS SUCCESSFUL IN SHOWING THAT JUST AND ADEQUATE COMPENSATION WAS NOT TENDERED BY THE EXPROPRIATING AUTHORITY, CONSTITUTE A DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW AND WITHOUT JUST COMPENSATION UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES OF AMERICA?

STATEMENT OF THE CASE

In these cases, the STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HIGHWAYS in October of 1973, expropriated a certain parcel of property owned by the UNITED PENTECOSTAL CHURCH OF HODGE, LOUISIANA, as well as another parcel of property owned by MALCOLM D. WHITMAN, defendants in these matters. In the case of The State of Louisiana, through the Department of Highways vs. The United Pentecostal Church of Hodge, Louisiana, the State filed a petition in the Second Judicial District Court of the State of Louisiana, bearing Docket Number 14,627.

This was done in order to complete the process of expropriation of the property of the United Pentecostal Church, needed for construction, in the Parish of Jackson, Louisiana, of a certain highway project designated as State Project Number 23-06-19, Federal Aid Project Number DP-F-01-16(001), Jonesboro-Hodge Highway, State Route Louisiana-U.S. 167. In a survey made by the State of Louisiana, through the Department of Highways, the area of the land taken for the construction of the highway, for which payment was tendered by the State, was found to be 2,346.6 square feet more or less. The State had estimated the value of this property to be the sum of $3,632.00 and had tendered this amount to the defendant, United Pentecostal Church of Hodge, Louisiana. In the Second Judicial District Court of Louisiana, in Jackson Parish, Louisiana, at the trial of the matter, the Trial Judge found that the area actually taken was greater than that estimated by the State of Louisiana, through the Department of Highways. He awarded compensation for 2,582 square feet, in the amount of $4,518.50. He further found miscellaneous improvements taken in the amount of $2,350.00, severance damages in the amount of $77,151.50, and in addition, he awarded the sum of $13,335.10 for the fees of expert witnesses who testified on behalf of the United Pentecostal Church at the trial of this matter.

From this judgment of the Trial Court, the plaintiff, State of Louisiana, through the Department of Highways, appealed this matter to the Second Circuit, Court of Appeals of the State of Louisiana. In the judgment rendered on June 3rd, 1975, the Second Circuit Court of Appeals of Louisiana reduced the judgment of

the Trial Court to the sum of $25,629.14, which amount was a total of the following specific awards:

1. Award for the land taken	$ 3,279.14
2. Award for improvements taken	2,350.00
3. Severance damages	20,000.00
TOTAL	$25,629.14

In addition to this judgment, the Court of Appeals reduced the award to the defendant for its expert witness fees to $3,527.00. An application for rehearing, filed timely, to the Second Circuit Court of Appeals of Louisiana, was denied on July 1st, 1975. Finally, writs of certiorari to the Supreme Court of Louisiana were applied for and were denied on September 19th, 1975.

In the companion case of State of Louisiana, through the Department of Highways vs. Malcolm D. Whitman, arising out of the same expropriation order under the exercise of eminent domain by the State of Louisiana in its sovereign capacity, the State of Louisiana, through the Department of Highways, in November, 1973, expropriated a certain part of land owned by Malcolm D. Whitman, defendant, and filed suit in the Second Judicial District Court in and for the Parish of Jackson, State of Louisiana, bearing Docket Number 14,667 to adjudicate the issue of just compensation. Pursuant to a survey conducted by the State of Louisiana, the tract was determined to contain 1,861.2 square feet, and the State estimated the sum of just compensation therefor to be $3,975.00, which amount was tendered to defendant, Malcolm D. Whitman. In the Louisiana Trial Court, the tract was found to actually contain 4,132 square feet and the value therefor

was increased to $7,231.00. Further, severance damages were found at the Trial Court in the amount of $5,391.75 and improvements taken were found to be justly compensable in the amount of $15,000.00. Further, the Trial Court awarded expert witness fees in the amount of $8,449.80. The State of Louisiana, through the Department of Highways appealed devolutively from the judgment rendered by the Trial Court to the Second Circuit Court of Appeals of the State of Louisiana, and judgment was rendered there on September 19th, 1974, reducing the amount of just compensation to the defendant from $27,622.18 to $13,-099.00. The Second Circuit Court of Appeals of Louisiana further reduced the expert witness fees awarded the defendant from $8,449.80 to $2,450.00.

REASONS FOR GRANTING THE WRIT

It is submitted by defendants, The United Pentecostal Church of Hodge, Louisiana, and Malcolm D. Whitman, plaintiffs in error here, that a decision by this Honorable Court on this particular element which arises in every contested expropriation case throughout the nation in which a State or the United States attempts to exercise its sovereign right of eminent domain, will be a landmark decision with effects which will reach far and wide throughout the entire nation. It is further submitted that this issue has never been squarely dealt with by this Honorable Court on its specific merits. Finally, it is submitted that a firm decision upon this issue by this Honorable Court is absolutely vital to the guarantee of the following:

United States Constitution, Amendment Fourteen, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protections of the laws."

United States Constitution, Amendment Five:

> ". . . nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Argument Number 1

The effects of this decision will reach far and wide throughout the entire nation.

Since the adoption of the Constitution of the United States of America, it has been necessary for the United States and the individual states to exercise their sovereign right of eminent domain in the interest of

the welfare of the citizens of the individual states and the nation. When this is done, the individual citizen is required to give up his private property subject to the guarantee that he will receive just compensation through due process of law. As has happened in the past, it will be necessary for the United States and the individual states of the nation to continue to exercise their sovereign right of eminent domain in the interest of all the people of the nation and the states. The sole question presented here is whether those guarantees of just compensation through due process of law are maintained in the specific situation in which the government fails to offer just or adequate compensation and necessitates the activation of the legal processes in order that the citizen may ultimately secure the benefits of the guarantee of just compensation for his property. When a citizen activates the legal processes to insure his guarantee of just compensation for his property, he has the burden of proving that compensation tendered to him is not truly just. In cases involving property, it is always necessary for experts in the field to determine the true value of the property in order that the landowner may carry his burden of proof. Therefore, in every case in which the landowner attempts to protect his guarantee of just compensation, he is additionally burdened with the expenses of these experts. If he successfully carries the burden of proof, the amount of just compensation is increased to comply with that determined in the legal process. However, the landowner's expenses for expert witness fees have not in the past been guaranteed to him in such cases where he has proven that the government failed to offer just and adequate compensation. It is submitted that in every such case, the dis-

allowance of such fees is a denial of the complete due process of law and of just compensation for one's private property taken for public purposes. Defendants, plaintiffs in error, do not submit the question of expert fees in situations in which the defendant is not successful in proving that just compensation was not tendered by the governing authority. However, even in the limited situations in which the landowner does prove that the compensation tendered was not just and adequate, the effect of this Honorable Court's decision will be extremely significant.

Argument Number 2

This Honorable Court has never squarely dealt with the issue of expert witness fees as an element of just and adequate compensation; there are various opinions throughout the nation as to whether these fees are an element of just and adequate compensation.

The leading case by this Honorable Court, cited in Federal jurisprudence throughout the nation, appears to be the case of *Dohany vs. Rogers*, 281 U.S. 362, 74 L.Ed. 904. However, Mr. Justice Stone, speaking for the Court made only the following statement regarding fees, primarily attorneys fees at 281 U.S. 368, 74 L.Ed. 911:

> "Attorneys' fees and expenses are not embraced within just compensation for land taken by eminent domain. See *Joslin MFG. Co. v. Providence*, 262 U. S. 675, 67 L.ed. 1174, 43 Sup. Ct. Rep. 684. A State may allow the recovery of an attorney's fee in special classes

> of proceedings while withholding them in others."

From this quotation, it can easily be seen that Mr. Justice Stone was referring primarily to the area of attorneys fees. Further, looking to the case of *Joslin Mfg. Co. vs. Providence*, 262 U.S. 675, 67 L.Ed. 1174, 43 Sup. Ct. Rep. 684, Mr. Justice Sutherland, speaking for the Court stated:

> "Second. The act, it is asserted, denies the equal protection of the laws, among other things, by permitting the owner of a business established prior to the passage of the act to recover for injury thereto, while withholding such compensation from one whose business has been established since; and by allowing a mill owner to recover the cost of removing his machinery to a new location within the New England States, while denying a similar right to one desiring to move to a location elsewhere. It is further asserted by plaintiffs in error, in their capacity as tax payers, that the effect of allowing these and other consequential damages is to deprive them of their property without due process of law.
>
> Injury to a business carried on upon lands taken for public use, it is generally held, does not constitute an element of just compensation."

Therefore, it can readily be recognized that neither the case of *Dohany vs. Rogers* nor the case cited by the

United States Supreme Court there, of *Joslin Mfg. Co. vs. Providence*, dealt firmly and squarely with the issue of expert witness fees as an element of just compensation when private property is taken for public purposes. However, the case of *Dohany vs. Rogers* has been repeatedly cited in Federal jurisprudence. See *U. S. vs. 15.3 acres of land in the City of Scranton, Pennsylvania*, 158 Fed. Sup. 122; *U. S. vs. 254.35 acres of land in Caddo Parish, Louisiana, et al*, 46 Fed. Sup. 913; and *U. S. vs. 251.81 acres of land in Meade County, Kentucky*, 50 Fed. Sup. 81. It is submitted that these cases rely improperly upon the case of *Dohany vs. Rogers* to disallow attorneys costs and expert witness fees.

Further, it is submitted that throughout the United States, various state courts have reached decisions which are totally contrary thereto regarding this very topic. In 18 ALR 2nd 1225, Section 1, at page 1226, it is stated:

> "Although most of the cases within the scope of this annotation are governed by a particular statute, reference should be made to the following cases, wherein it was held that the condemnor was liable for the fees of expert witnesses called by the property owner, there being no overt reliance upon statutory authority or interpretation. *Los Angeles vs. Moyer*, (1930) 108 California Appellate 4, 290 Pacific 1073; Re New York (Mohansic Lake and Little Mohansic Lake) (1933) 237 Appellate Division 570, 261 NYS 905; *Studwell vs. Halstead*, (1909) 62 MISC 330, 116 NYS

> 68, affirmed without opinion 134 Appellate Division 921, 118 NYS 1145."

Further, in 18 ALR 2nd 1225, Section 4, at page 1230, it is stated:

> "However, some Courts have taken the view that a denial of an allowance for witness fees would violate the Constitutional guarantee of 'just compensation.'
>
> Thus, in holding that a property owner has not received 'just compensation' for his land if he is put to an expense in order to establish the value of his property by expert witnesses upon an eminent domain proceeding, the Court in Re Water Supply (1908) 125 Appellate Div. 219, 109 NYS 652, affirmed without opinion 192 NY 569, 85 NE 1117, stated that 'he does not want to sell, the property is taken from him through the exertion of the high powers of the State, and the spirit of the Constitution clearly requires that he shall not be thus compelled to part with what belongs to him without the payment, not alone of the abstract value of the property, but evolve the necessary expenses incurred in fixing that value. This would seem to be dictated by sound morals as well as by the spirit of the Constitution, and it will not be presumed that the Legislature has intended to deprive the owner of property of the full protection which belongs to him as a matter of right.' The reasoning of this case was quoted with approval in *Dade County vs. Brigham*

(1950) — Florida, 47 So. 2d 602, 18 ALR 2nd 1221, supra, Section 3.

And the same result was reached in *Denver Joint Stock Landbank vs. Board of County Commissioners*, (1940) 105 Col. 366, 98 Pacific 2nd 283, where the Court stated 'to require the owner of property involved in condemnation proceedings to carry the burden of costs would not be "just" within the meaning of the Constitutional guarantee.' "

In the case of *Dade County vs. Brigham, et al*, 47 So. 2d 602, Justice Hobson, speaking for the Supreme Court of Florida stated:

"Since the owner of private property sought to be condemned is forced into Court by one to whom he owes no obligation, it cannot be said that he has received 'just compensation' for his property if he is compelled to pay out of his own pocket the expenses of establishing the fair value of the property, which expenses in some cases could conceivably exceed such value. The plight of the landowner in this situation is well settled by the New York Court in Re Water Supply in City of New York, 125 App. Div. 219, 109 NYS 652, 654."

Thus, it can readily be seen that there is a divergence of opinion among the states as to what constitutes just compensation within the meaning and intent of Amendments Five and Fourteen to the United States

Constitution. Therefore, it is submitted that this Honorable Court should now determine specifically that when a landowner is compelled to contest the amount awarded as just compensation by the governing authority, and is successful in proving that such amount was not truly just, he is entitled to the costs of expert's fees which are absolutely necessary in any determination of that nature.

Argument Number 3

It is necessary that this Honorable Court determine that the assessment of expert fees against a governing authority is vital in insuring that the individual shall be guaranteed just compensation and due process of law for his property, as is mandated by the Fifth and Fourteenth Amendments to the United States Constitution. In the instant cases, tremendous fees were incurred by the plaintiffs in error in an attempt to determine not only the value per unit measure of the property taken but even further, the actual amount of land taken in the State's exercise of its sovereign right of eminent domain. The United Pentecostal Church of Hodge, Louisiana, incurred expert fees in the sum of $13,335.10, which were awarded by the Trial Judge in the matter, only to be later reduced by the Louisiana Court of Appeals to $3,527.00. Plaintiff in error, Malcolm D. Whitman, incurred expert witness fees in the amount of $8,449.80, which were later reduced by the Louisiana Court of Appeals to $2,450.00. It was ultimately determined that the United Pentecostal Church of Hodge, Louisiana, was entitled to just compensation in the amount of $25,629.14 as opposed to the amount of $3,632.00 which was originally tendered by

the State of Louisiana. Plaintiff in error, Malcolm D. Whitman, was ultimately awarded $13,099.00 for his property as opposed to $3,975.00 which was tendered by the State of Louisiana as just compensation. Therefore, it can readily be seen that the value of the property taken by the State of Louisiana from the United Pentecostal Church was more than seven times the amount tendered and the value taken by the State of Louisiana from Malcolm D. Whitman was more than three times the amount tendered by the State of Louisiana. Those amounts are the full amounts which would have been necessary to have constituted just compensation. However, the United Pentecostal Church of Hodge, Louisiana will ultimately be required to bear almost $10,000.00 of the cost of its expert witnesses which were absolutely essential in its successful proof of the fact that the State had not tendered just compensation. Plaintiff in error, Malcolm D. Whitman, will ultimately be required to bear the burden of $6,000.00 in expert witness fees, the same being essential to his proof of the fact that the State of Louisiana had not tendered just compensation to him. Plaintiffs in error submit that the conclusion is unavoidable that they have still not received just compensation because of the extremely harsh and undue burden which has been placed upon them, not merely the burden of proving the fact, but further, the burden of providing for himself a fair and impartial appraisal which had apparently not been rendered by the State of Louisiana in the initial stages of the proceedings. There is no way in which, under these circumstances, a landowner can ever receive adequate and just compensation for his property. He is helpless and defenseless against the powers of the sovereign, being placed

on the horns of a dilemma. He may either choose to make the ultimate sacrifice and surrender his private property to the sovereign for whatever amount is offered by that authority, regardless of whether such amount is fair, just, impartial, or adequate, or he may choose to attempt to bear the burden of proving the injustice of the amount tendered by the sovereign, and in so doing incur the additional burden and expense which he ultimately must pay, never having received a truly just and adequate compensation for his property. Plaintiffs in error submit that this was not the intent of our founding fathers when they drafted the Constitution of this great nation. Perhaps it was presumed that just compensation would be fairly and impartially determined by the sovereign before taking the property of the private citizen. However, before this Honorable Court are two glaring instances in which it is shown beyond any reasonable doubt that this is not the case. The power of the sovereign is great, and the disallowance of the costs of the individual in ultimately determining issues when the sovereign has made such determination necessary will, of necessity, always result in a denial of just compensation to the property owner.

In the case of *United States vs. Miller*, 317 U.S. 369, 87 L.Ed. 336, Mr. Justice Roberts, speaking for this Honorable Court stated:

> "The Fifth Amendment of the Constitution provides that private property shall not be taken for public use without just compensation. Such compensation means the full and perfect equivalent in money of the property

> taken. The owner is to be put in as good position pecuniarily as he would have occupied if his property had not been taken."

Plaintiffs in error submit that when an amount is tendered by the expropriating authority, and such amount is ultimately determined to be one-third to one-seventh of the true value of the property which is taken, that such insufficient tender has made it absolutely necessary for the landowner to incur the additional expense of attorneys fees, Court costs and expert witnesses to ultimately determine the true value of the property. When, as in the present case, the amounts paid to expert witnesses are not fully borne by the expropriating authority, not to mention attorneys fees, plaintiffs in error submit that this ultimately denies to them the right to be placed in as good a position pecuniarily as they would have been had the expropriation not taken place. In the instant cases, the amounts ultimately to be borne by plaintiffs in error ranged from $6,000.00 to $10,000.00 for expert witness fees alone. The conclusion would seem to be inescapable that pecuniarily, plaintiffs in error are not now in as good a position as they would have been had the expropriation not taken place. Therefore, it is submitted that it is absolutely necessary that this Honorable Court determine that those fees should be assessed against the expropriating authority in order that plaintiffs in error will be ultimately placed in as good a position, pecuniarily, as they would have been had the governing authority not exercised its sovereign right of eminent domain.

In the case of *United States vs. Fuller*, 409 U.S. 488, 35 L.Ed. 2nd 16, 93 Sup. Ct. 801, Mr. Justice Rehnquist, speaking for the Supreme Court stated:

> "The Constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, United States vs. Commodities Trading Corporation, 339 U. S. 121, 124, 94 L.Ed. 707, 70 S. Ct. 547 (1950), as it does from technical concepts of property law."

This very recent (1973) reiteration of this Honorable Court of the idea that just compensation under the Fifth Amendment to the Constitution must derive some of its meaning from the ideas of fairness and equity, is very noteworthy at this point. Plaintiffs in error submit that fairness and equity demand that expert fees in the particular case be assessed against the expropriating authority where that authority has not tendered an amount which is reasonably close to just compensation. In the interest of fairness and equity, plaintiffs in error submit that this Honorable Court should consider the fact that the State of Louisiana made it absolutely necessary that expert witnesses be hired in order to determine what was truly just compensation, and in so doing, that these fees should be assessed against the State of Louisiana. Had the true value of the property not been ultimately determined to be three to seven times that which was tendered by the State of Louisiana, perhaps fairness and equity would not have such bearing on the instant cases. However, in the present situation, the necessity of hiring experts and expending tremendous

amounts for their services was brought about primarily by the action of the State in failing to tender just compensation, or even any amount reasonably resembling just compensation, and therefore that expropriating authority, the State of Louisiana, should now bear the burden of these costs.

CONCLUSION

In conclusion, it is submitted that because of the fact that this Honorable Court has never specifically dealt with the instant situation of expert fees when an expropriating authority has tendered an amount which is ultimately a minute portion of just compensation, this Honorable Court should now determine that issue in favor of plaintiffs in error. Further, because of the fact that the case of *Dohany vs. Rogers*, supra, may be distinguished from the present case, even though it is frequently cited by Federal Courts as authority for determining issues similar to those in this case, and because of the fact that State Supreme Courts in certain areas of the nation have determined that expert fees as in the instant case are absolutely essential to the ideas of just compensation under the Fifth and Fourteenth Amendments to the United States Constitution, it is submitted that a firm decision by this Honorable Court on this very important issue would now be vital and essential to the ideas of imminent domain under the United States Constitution. Finally, because of this Honorable Court's statements in the past to the effect that just compensation requires that the landowner be in a position which is pecuniarily equivalent to that in which he would have been had the

expropriating authority not taken his property, and considering the principles of equity, justice and fair play, which this Honorable Court has determined are applicable in such cases, this Honorable Court should now determine that those expert witness fees incurred by landowners in the instant cases should be assessed against the State of Louisiana.

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CERTIFICATE

I hereby certify that a copy of the foregoing Application for Writs has been served upon the STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HIGHWAYS by mailing a copy of same, in the United States mail, sufficient postage prepaid, to Mr. Jack C. Fruge, 131 Court Street, Ville Platte, Louisiana 70586.

Jonesboro, Louisiana, this ____ day of October, 1975.

WILLIAM H. BAKER

BOBBY L. CULPEPPER

APPENDIX

Second Judicial District Court
Parish of Jackson — State of Louisiana

State of Louisiana, Through The Department of Highways

vs. No. 14,627

United Pentecostal Church of Hodge, Louisiana

REASONS FOR JUDGMENT

This is another of numerous expropriation suits instituted in this Court by the State of Louisiana, through the Department of Highways. This particular suit involves the taking of certain property belonging to the United Pentecostal Church of Hodge, Louisiana. The project necessitating the taking is the four laning of U.S. Highway No. 167 which traverses Jackson Parish, Louisiana, from the south and north. This route also goes through the corporate limits of the Town of Jonesboro and the Village of Hodge in Jackson Parish.

The particular property in question is located at the southwest corner of U.S. Highway No. 167 and First Street and is located between the corporate limits of the Town of Jonesboro and the Village of Hodge, being immediately south of the corporate limits of the Village of Hodge.

The property taken consists primarily of property lying between the existing right of way of U.S. Highway

167 and the church building owned by the defendant and situated on the subject property.

The property owned by the church has a frontage of approximately one hundred seventy-eight feet along U.S. Highway 167 with an average depth of approximately one hundred eighty feet. Located on this subject property is the church sanctuary, educational building attached thereto and the usual improvements situated on the ground consisting of various types of lighting, paved areas, etc. Also, included in the improvements taken in this particular case is a brick retaining wall located along and parallel with the present highway right of way.

On October 24, 1973, the Department filed the expropriation petition and deposited into the Registry of the Court the sum of Three Thousand Six Hundred Thirty-two and No/100 ($3,632.00) Dollars. This amount deposited by the Department, in its opinion, represented the fair value of the land and improvements taken, with no allowance being made for damages to the remainder as the result of the partial taking.

As is usual in these cases, various expert real estate appraisers testified for each litigant. Noise level experts also gave their opinion as to the present and future effects of highway noise on the church property and the church services held in the buildings located on the subject property. Experts also testified as to their opinion concerning the value of the improvements located on this property.

The Court makes the following findings of fact and conclusions regarding this litigation:

1. The whole land area owned by the defendant, for the purposes of this litigation, is taken to be thirty-three thousand (33,000) square feet;

2. The part taken consists of two thousand five hundred eighty-two (2,582) square feet with a value of One and 75/100 ($1.75) Dollars per square foot or a total of Four Thousand Five Hundred Eighteen and 50/100 ($4,518.50) Dollars;

3. The value of the six gas lights on the part taken, and in the yard area, is determined by the Court to be Four Hundred Fifty and No/100 ($450.00) Dollars;

4. The value of the five bumper posts taken with forty lineal feet of chain located between them is determined to be the sum of Seventy-five and No/100 ($75.00) Dollars;

5. The value of the concrete walk taken is determined to be the sum of One Hundred Five and No/100 ($105.00) Dollars;

6. The value of the asphalt and gravelled parking area taken, together with the brick retainer wall at the front, is determined to be the sum of One Thousand Seven Hundred Twenty and No/100 ($1,720.00) Dollars;

7. Therefore, the total value of the property taken, together with the improvement situated thereon, is determined by the Court to be the sum of Six Thousand Eight Hundred Sixty-eight and 50/100 ($6,868.50) Dollars.

The remaining question to be determined by the Court is whether there were damages to the remainder of the property after the taking. The testimony in this case and the evidence adduced shows that U.S. Highway 167 between the Town of Jonesboro and the Village of Hodge is a heavily travelled thoroughfare, with numerous trucks and vehicles larger than automobiles using the highway. Also, the evidence shows that it is the intention of the Department to construct another lane for highway traffic between the present travelled portion of the highway and the building owned by the defendant and situated on the subject property.

The evidence in the case indicates that the front porch portion of the building owned by the defendant and situated on the subject property is now approximately sixty-eight feet from the existing centerline of U.S. Highway 167. The present roadbed also extends twelve feet west of this centerline, plus a ditch and shoulder of approximately eleven feet in width or a total of twenty-three feet of present improvements west of the centerline of the travelled portion of Highway 167. The front porch of the church is now situated approximately forty-five feet from the nearest highway improvements and fifty-six feet from the nearest traffic lane. However, the taking involved in this particular case will put the highway right of way within ap-

proximately eighteen feet of the front porch of the church as it is now situated. After the planned constructions are made by the Highway Department, there will be two lanes for traffic west of the centerline of the highway as it now exists, requiring 25.5 feet. Then west of these improvements, there will be a ten-foot wide shoulder area, or a use by the Department presently of approximately 35.5 feet of the area between the front porch of the church and the centerline of the highway as it now exists. The barrier curb at the northeast corner of the subject property will have a thirty-five foot radius, and this will result in the taking of six parking spaces now utilized by the church.

After visiting the site of the taking, and listening to the experts who testified in this case, this Court is of the opinion that the remainder of the property has been damaged by the taking. These damages consist of the proximity of the traffic and noise generated by the highway when it is completed, the location of the right of way of the highway to the improvements of the subject property after the taking, the fumes and the noise as a result of the traffic travelling the highway after it is completed, and the restriction on the use of the front entrance to the church after the taking. However, the Court is inclined to agree with the appraisers for the defendant that the principal cause of the diminution in value of the remainder of the property in question is because of the proximity of the taking. This, together with the proximity of the vehicles using the highway to be constructed and the noise that will be generated by it comprise primarily the factors making up the severance damages.

In determining the severance damages to the defendant in this case, the Court has computed what, in its opinion, represents a fair value for the land and the improvements prior to the taking, which is as follows:

Value of land	$ 57,750.00
Improvements on land, including the lighted sign	190,000.00
Depreciation of ten percent or $19,000.00 leaving a depreciated value, prior to the taking of	171,000.00
Eight yard lights at $75.00 each or	600.00
Parking areas, both gravelled and blacktop and parking bumpers	3,000.00
1,192 square feet of concrete walks at $.60 per square foot or	715.00
Brick retaining walls	955.00
Total value of improvements, depreciated prior to the taking	$234,020.00

Subtracting from this the part taken, we have the following as stated above:

2,582 square feet taken at $1.75 per square foot	$4,518.50
6 gas lights at $75.00 each	450.00
5 bumper posts and chain	75.00
174 square feet of concrete walks at $.60 per square foot	105.00
Parking areas, both gravelled and asphalt and brick retainer wall	1,720.00
Total value of land and improvements taken	$6,868.50

Therefore, the Court finds that the total value of the property before the taking, including the improvements depreciated and the value of the land, amounted to the total sum of Two Hundred Thirty-four Thousand Twenty and No/100 ($234,020.00) Dollars. The value of the part taken amounted to the sum of Six Thousand Eight Hundred Sixty-eight and 50/100 ($6,868.50) Dollars, leaving a balance of Two Hundred Twenty-seven Thousand One Hundred Fifty-one and 50/100 ($227,151.50) Dollars as the value of the land and improvements after the taking, and before a computation for any severance damages in connection therewith.

This Court has come to the conclusion that the property has a value of One Hundred Fifty Thousand and No/100 ($150,000.00) Dollars, after the taking, or a severance damage of Seventy-seven Thousand One Hundred Fifty-one and 50/100 ($77,151.50) Dollars. This amount, when added to the sum of Six Thousand Eight Hundred Sixty-eight and 50/100 ($6,868.50) Dollars as set forth above, is the amount which, in the opinion of this Court, the defendant is entitled to recover, together with the expenses incurred by it for its appraisers and other experts, the Court accepting as reasonable the fees as testified to by the experts.

The Department of Highways shall pay all costs of these proceedings, except those costs from which it is specifically exempted by statute from having to pay.

THUS DONE AND SIGNED on this the 21st day of June, 1974.

/s/ DAVID T. CALDWELL
JUDGE
SECOND JUDICIAL DISTRICT COURT
PARISH OF JACKSON
STATE OF LOUISIANA

Second Judicial District Court
Parish of Jackson — State of Louisiana

State of Louisiana, through the Department of Highways,

vs. No. 14627

United Pentecostal Church of Hodge, Louisiana

JUDGMENT

This matter came for trial pursuant to regular assignment on May 23rd, 1974.

Present: Robert L. Ledoux and John H. Helm, Attorneys for Plaintiff, State of Louisiana, through the Department of Highways

and

William H. Baker
Attorney for Defendant, United Pentecostal Church of Hodge, Louisiana

The Court after considering the stipulations and agreements of counsel, reviewing the documentary evidence and considering the testimony of the witnesses produced at trial and considering the law and the evidence to be in favor of the defendant, the UNITED PENTECOSTAL CHURCH OF HODGE, LOUISIANA, for written reasons rendered on the 21st day June, 1974.

IT IS ORDERED, ADJUDGED AND DECREED, that there be judgment herein in favor of the defendant, the UNITED PENTECOSTAL CHURCH OF HODGE, LOUISIANA in the full and true sum of EIGHTY-FOUR THOUSAND TWENTY AND NO/100 ($84,-020.00) DOLLARS, subject to a credit of THREE THOUSAND SIX HUNDRED THIRTY-TWO AND NO/100 ($3,632.00) DOLLARS, previously deposited by the State of Louisiana, through the Department of Highways leaving a balance of EIGHTY THOUSAND THREE HUNDRED EIGHTY-EIGHT AND NO/100 ($80,388.00) DOLLARS, together with legal interest thereon at the rate of 7% per annum from October 24, 1973, until paid. The above amount includes the following awards pursuant to the reasons for judgment, to-wit:

Land Taken	$ 4,518.50
Improvements Taken	2,350.00
Severance Damage	77,151.50
	$84,020.00

In addition to the above amounts, the fees of the expert witnesses used by defendant are fixed as follows:

Hab Monsur	2.475.00
Derrell Willett	2,475.00
H. L. Bass	1,950.00
O. L. Jordan	1,725.00
Richard Crawford	577.00
Lavelle Nunn	744.80
Don Barron	805.10
Thomas R. Terrall	858.20
A. Ray Bond	300.00
Wesley Prestridge	350.00
Joe Simmons	850.00
Lauren Willett	225.00

and are taxed as cost of Court.

Plaintiff, State of Louisiana, through the Department of Highways, is cast with all costs herein, specifically including the expert witness fees but excluding any costs for which the State is exempted by statute from assessment.

JUDGMENT RENDERED, READ, FILED AND SIGNED in Open Court on the 21st day of June, 1974, in Jonesboro, Jackson Parish, Louisiana.

/s/ DAVID T. CALDWELL
DAVID T. CALDWELL,
JUDGE

Judgment rendered June 3, 1975. Application for rehearing may be filed within the delay allowed by Art. 2166, LSA-CCP.

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

STATE OF LOUISIANA, through DEPARTMENT OF HIGHWAYS,
Plaintiff-Appellant,

versus No. 12,550

UNITED PENTECOSTAL CHURCH OF HODGE, LOUISIANA,
Defendant-Appellee.

Appeal from the Second Judicial District Court,
Parish of Jackson, State of Louisiana

Hon. David T. Caldwell, Judge

D. Ross Banister
William W. Irwin, Jr.
Jerry F. Davis
Robert L. Ledoux
Johnie E. Branch, Jr.
Jack C. Fruge', Sr.
by Jack C. Fruge'
Attorneys for Plaintiff-Appellant

Holloway, Baker, Culpepper
& Brunson
by William H. Baker and
Herman A. Castete
Attorneys for Defendant-Appellee

Before BOLIN, HALL and MORRIS, JJ.

By BOLIN, J.

In order to widen Louisiana Highway No. 167 from an existing two-lane road to a four-lane thoroughfare, the State of Louisiana, through Department of Highways, acting under the authority granted it by Louisiana Revised Statutes 48:441 et seq., expropriated a strip of land approximately eleven feet deep across the front of defendant's property which is located on the west side of the highway and on which is situated a church building. For purposes of increasing visibility plaintiff also expropriated a small triangular-shaped lot located in the northeast corner of defendant's property which is bounded on the north by First Street. As compensation for the land taken the Department of Highways deposited the sum of $3,632 in the registry of the court. Being dissatisfied with the amount deposited, defendant sought a judicial determination of the amount of compensation due it.

Following trial on the merits the judge, for written reasons assigned, found the property expropriated by the highway department consisted of 2,582 square feet with a value of $1.75 per square foot, or a total of $4,518. The court also found miscellaneous items of improvements owned by defendant were either destroyed or

damaged to the extent of $2,350. These items consisted of six gas lights, five bumper posts and connecting chains, 174 square feet of concrete walks, a brick retaining wall and concrete in the parking area. The court further found severance damage to the remainder of defendant's property, including the church building, in the sum of $77,151.50. There was judgment in favor of defendant and against the Department of Highways for the total sum of $84,020, subject to a credit of $3,632 previously deposited in the court, plus legal interest from October 24, 1973, and costs. In addition the fees of the expert witnesses used by defendant were fixed at $13,335.10 and taxed as cost against the Department of Highways, which has appealed.

In this court defendant has filed a motion to dismiss the appeal. We overrule the motion to dismiss. We further amend the judgment by reducing the amount of the award to the landowner and reducing the amount fixed for the fees of the experts.

MOTION TO DISMISS

The motion to dismiss was based on the following grounds: (1) the petition for appeal was not signed by an attorney of record for appellant as provided by Louisiana Code of Civil Procedure Article 863; (2) appellant failed to deposit the additional amount awarded by the trial court; and (3) the transcript of testimony was not timely prepared and lodged before this court.

Answering the grounds set forth above in the order stated, we find:

(1) The petition for the appeal was properly signed. The petition listed the attorneys of record for appellant and was signed on behalf of these record attorneys. The primary purpose of Louisiana Code of Civil Procedure Articles 863 and 864 is to fix responsibility against an attorney in the event disciplinary action is necessary because of the filing of improper pleadings. Berglund v. F. W. Woolworth Co., 236 So. 2d 266 (La. App. 4th Cir. 1970). It is appropriate to also point out that appeals are favored in our law and may be taken by oral motion as well as written pleadings.

(2) In answer to the second ground, it is conceded plaintiff did not deposit the difference between the amount awarded and the amount previously deposited; however, in State, Department of Highways v. Holmes, 251 La. 607, 205 So. 2d 416 (1967), the court expressly held that the excess award was not required to be paid pending an appeal.

(3) We find no merit in the third ground since the failure to file the transcript was not imputable to plaintiff but, to the contrary, plaintiff made every effort to have the transcript filed in this court, which has been done.

MERITS

Appellant sets forth several specifications of error which may be summarized as follows: (1) the lower court incorrectly calculated the total area of the property belonging to defendant before the taking and also incorrectly calculated the amount of land

expropriated by plaintiff; (2) the lower court erroneously fixed the value of the land taken at $1.75 per square foot; (3) the amount awarded for severance damage was excessive; and (4) the amount of the fees fixed for the experts was excessive. In order to properly discuss and dispose of the errors alleged to have been committed by the trial judge it will be necessary to set forth the facts and general background of the case.

Before the taking defendant owned a lot located at the southwest corner of Highway No. 167 and First Street between the corporate limits of Jonesboro and Hodge, Louisiana. In this vicinity the highway was a hard-surface road running generally north and south. First Street was also hard-surfaced, running east and west, forming a T-intersection with the highway, with First Street forming the north boundary of defendant's property. While the exact size of the lot was disputed, it was approximately 178 feet wide and 178 feet deep on the north side and 193 feet deep on the south side. Located on the property was a brick church sanctuary, attached educational building, and incidental improvements such as outside gas lights, paved areas, etc. Also located in front of the sanctuary, but apparently on property belonging to plaintiff, was a brick retaining wall extending across practically the entire frontage. The expropriation of the eleven-foot strip across the front of defendant's property will not encroach upon the building but it will damage or necessitate the removal of some of the gas lights, the sidewalks, etc., which were located either on plaintiff's existing right-of-way or on the portion expropriated by these proceedings.

Directing our attention first to the question of the correct dimensions of the subject property, particularly as it relates to the land expropriated, we find the lower court correctly resolved this dispute. The highway department contends that the area expropriated was 2346 square feet which was the square footage reflected on the plat of survey prepared by plaintiff's engineer and attached to plaintiff's petition. The surveyor did not testify nor did the department offer any other evidence to substantiate the size of the area depicted on its plat.

Defendant contends the area was 2582.07 square feet and in support thereof offered the testimony of Richard Crawford, a registered and licensed surveyor and civil engineer. In connection with Crawford's testimony defendant filed a plat of survey. The lower court accepted the figure of 2582 square feet as being the correct amount of property expropriated and we find no error in this portion of the findings of the district judge. We also find the plat of survey made by Crawford reflects the correct dimensions of defendant's property both before and after the taking.

We find merit in plaintiff's contention that the lower court erroneously calculated the value of the land taken on the basis of $1.75 per square foot. L. J. Roy and Dan Carlock, expert appraisers testifying for plaintiff, each estimated the value of the land to be $1.00 per square foot. Expert appraisers testifying for defendant were Hab Monsur, Jr., and Darrell Willett. Willett testified the land has a value of $1.27 per square foot and Monsur testified the value was $1.40 per square foot. It was stipulated that if O. L. Jordan were called to

testify for defendant he would testify essentially the same as Willett and that if H. L. Bass were called he would testify the same as Monsur. It is therefore apparent there was no testimony to support the lower court's award of $1.75 per square foot for the land taken. We conclude a fair basis for calculating the award would be $1.27 per square foot, or the sum of $3,279.14 for the land expropriated by plaintiff.

The lower court awarded $2350 for the taking or damaging of miscellaneous improvements located in the portion expropriated. This has not been questioned on appeal and we find no error in this award.

Considering next the question of severance damages, the trial judge in awarding defendant $77,150.50 for this item stated:

> "After visiting the site of the taking, and listening to the experts who testified in this case, this Court is of the opinion that the remainder of the property has been damaged by the taking. These damages consist of the proximity of the traffic and noise generated by the highway when it is completed, the location of the right of way of the highway to the improvements of the subject property after the taking, the fumes and the noise as a result of the traffic travelling the highway after it is completed, and the restriction on the use of the front entrance to the church after the taking. However, the Court is inclined to agree with the appraisers for the defendant that the principal cause of the diminution in value of the

> remainder of the property in question is because of the proximity of the taking. This, together with the proximity of the vehicles using the highway to be constructed and the noise that will be generated by it comprise primarily the factors making up the severance damages."

While we agree the value of defendant's property has diminished because of the taking, we find the amount awarded by the lower court is grossly excessive. The measure of compensation due a landowner under the highway "quick taking" statute at the time this suit was filed in 1973, is set forth in Louisiana Revised Statutes 48:453:

> "The market value is determined as in general expropriation suits but as of the time the estimated compensation was deposited in the registry of the court.
>
> "*Damage to the remainder of the property is determined as of the date of the trial.*
>
> "In either case the defendant has the burden of proving his claim." (Emphasis added)
> [This was amended in 1974 to become effective for all suits filed after January 1, 1975]

The highway department contends there was no difference between the market value of the remainder of the property before and after the taking. L. J. Roy and Dan Carlock testified there was no severance damage.

Defendant argues its property was extensively damaged by the taking. All of defendant's expert witnesses were of the opinion the church property would be damaged principally because of the increased noise that would be caused by the church building being closer to the traveled portion of the new highway. Joe Simmons, testifying for defendant as a sound expert, thought the noise level would be appreciably increased.

We conclude all estimates of severance damage by defendant's witnesses were partially based on the false premise that the highway department would hard surface the entire right-of-way which would be utilized for automobile traffic. The plat of survey attached to plaintiff's petition reflects that only a part of the expropriated property will be utilized for widening the hard-surfaced or travel portion of the highway. According to defendant's surveyor, the church building is presently located 61.9 feet from the pavement at the closest point and will be 47.4 feet from the paved portion if the construction is performed in accordance with the highway department's plans and specifications. This witness gave the measurement from the outer edge of the expropriated property to the nearest portion of the church as 23.35 feet.

Defendant strenuously argues that because the highway department could, at some time in the future, change its construction plans and extend the paved portion of the road nearer to the church, this should be considered as a present damage to its property. We consider this argument to be unsound and based on speculation and conjecture. State, Department of

Highways v. Genest, 218 So. 2d 114 (La. App. 3d Cir. 1968) appropriately states the law on this question as follows:

> "The severance damages contemplated by the statute are generally those to result after construction of the highways for which the land is taken. State through Dept. of Highways v. Black, La. App. 3d Cir., 207 So. 2d 583; cf., LSA-R.S. 48:451. The jurisprudence interpreting the cited statute permits the landowner to elect whether to sue immediately for the contemplated severance damages rather than to wait until after the construction is completed, but the landowner nevertheless bears the burden of proving what his severance damages will be upon the completion of the project. State Through Dept. of Highways v. Black, cited above."

All evidence was to the effect that the planned construction, for which the property was expropriated, would widen the traveled portion of the highway only about 14 feet. Therefore, under La. R.S. 48:453, and cases decided thereunder, severance damage should be limited to that caused by the increase in the noise level resulting from widening of the highway for this distance.

While we have been unable to find any Louisiana case where severance damage has been awarded to the owner of church property because of increased noise, we conclude this is a compensable item. Property owned and utilized by a church for worship services

falls within the category of special use property and the usual method of calculating the market value based on what the property would sell for on the open market is obviously inapplicable. We think the same logic would apply in arriving at severance damage to church property.

The pastor of defendant church testified services were frequently held in the sanctuary and any increase in the noise level would adversely affect these services and would diminish the value of the premises being used for these services. In State, Department of Highways v. Banquer, 308 So. 2d 520 (La. 1975), severance damages in the sum of $9,400 were awarded a landowner where the distance from the street to his estate-type home was reduced from 55 to 29 feet. However, this award was based on the difference in the market value of the property before and after the taking. See also State, Department of Highways v. Garrick, 260 La. 340, 256 So. 2d 111 (1972), wherein severance damages were awarded under similar circumstances.

In arriving at the proper award for severance damages, this court takes into consideration the fact that defendant's church was located on an undesirable lot adjacent to a much-traveled highway before these expropriation proceedings were instituted. The widening of the highway into a four-lane thoroughfare will merely render the church property more undesirable than it was prior to the expropriation.

After a careful consideration of all the evidence we conclude an award of $20,000 for severance damage

would adequately compensate defendant in this case. This award is based on our belief the increased noise level will be slight.

EXPERT WITNESS FEES

Next for consideration is plaintiff's allegation that the award of fees for defendant's expert witnesses is excessive. Keeping in mind the discretionary right of the trial judge to fix these fees, we have examined this portion of the record in order to determine if there has been an abuse of this discretion.

The following fees were charged by the expert witnesses for defendant and were considered reasonable by the trial judge who awarded same as costs against plaintiff Department of Highways:

Hab Monsur	$ 2,475.00
Darrell Willett	2,475.00
H. L. Bass	1,950.00
O. L. Jordan	1,725.00
Richard Crawford	577.00
Lavelle Nunn	744.80
Don Barron	805.10
Thomas R. Terrall	858.20
A. Ray Bond	300.00
Wesley Prestridge	350.00
Joe Simmons	850.00
Lauren Willett	225.00
	$13,335.10

Preliminary to a consideration and discussion of each of the fees fixed and listed above, we deem it appropriate to set forth several pertinent principles of law. The amount agreed upon between an expert witness and the party calling him is not a criterion as to the amount to be taxed as costs. See Daigle v. Hardware Dealers Mutual Fire Insurance Co., 165 So. 2d 643 (La. App. 1st Cir. 1964); State of Louisiana, through Department of Highways v. Smith, 270 So. 2d 178 (La. App. 1st Cir. 1972).

The defendant can have taxed as court costs the reasonable cost of time spent by the expert in gathering facts necessary for his testimony but not for time spent in consultation which only assists the attorney in preparation for the litigation. Cox v. East Baton Rouge Parish School Board, 165 So. 2d 667 (La. App. 1st Cir. 1964), citing a long line of jurisprudence. In State v. LaBauve, 75 So. 2d 862 (La. App. 1st Cir. 1954) it was held a court will only award expert witness fees when the witness is in court testifying or in court waiting to be called to testify, and expert witness fees will not be awarded to an expert after he has testified, even though he stays in court only for the purpose of consulting the party who summoned him.

Hab Monsur, Jr., qualified as an expert appraiser for defendant, testified in detail relative to the square foot value assigned to each part of the church. He went on the property twice and actually measured the square feet of the building. His testimony consumed 15-1/2 pages of the transcript. His charge for his services to defendant was $2250 for appraisal and $225 for one day in court, or a total of $2475. Although this witness ob-

viously spent considerable time in research to arrive at his evaluation, we find no testimony nor evidence of the actual time consumed in preparing his appraisal. We find that $650, representing $500 for time spent in preparation and $150 for one day in court, would be a reasonable fee for this witness and this award is reduced from $2475 to $650.

Darrel V. Willett, an expert appraiser, testified to the size of the lot on which the church was located. He stated he had a floor plan in his appraisal report and this plan showed the various rooms used for related church activities and the educational building behind the sanctuary. His testimony required 25 pages of the record and reflected thorough acquaintance with the church, including market values of "special use" properties. However, as with the other appraisers, he failed to indicate how much time he spent preparing for trial. Willett's charge for the appraisal was $2250 and his fee for testifying $225, making a total of $2475. The lower court adopted his bill for services and awarded the total charge. We find a reasonable fee for this expert is $650, representing $500 for time spent in preparation and $150 for his testimony, and the award is hereby reduced from $2475 to $650.

It was stipulated that if H. L. Bass were called his testimony would be the same as that of Hab Monsur. Over objection of counsel for plaintiff the invoice of Mr. Bass was filed in evidence, reflecting a charge of $1800 for professional services rendered for appraisal and $150 for one day's appearance in court. The court awarded $1950 for this service, which we think excessive, and this award is reduced to $250.

It was stipulated that if O. L. Jordan, real estate appraiser, were called he would testify essentially the same as that of Mr. Monsur. The bill of Mr. Jordan for appraisal services was offered and filed in evidence over the objection of plaintiff's counsel. It shows a charge of $1500 for appraisal service and $225 for one day in court, totaling $1725. The court awarded the full amount of these charges, which we find excessive and reduce to $250.

Richard Crawford qualified as a civil engineer and registered surveyor, testified he surveyed the property. He used the highway department's maps or plats to determine where the right-of-way was in the document of 1934. His survey reflected 2582.07 square feet as the area taken in the latest expropriation, i.e., the area between the existing right-of-way and the stakes showing where the new right-of-way will be. He testified he charged $427 for the survey and $150 a day for court appearance. The trial court awarded him $577, being the charge for his survey and a full day in court. The trial judge asked Crawford if his survey showed any significant difference between the amount he calculated and that shown by the highway plat. He replied in the negative except the minor amount of property on the corner which he supposed was taken to prevent any structure being built to obstruct visibility. This witness stated the hourly charge is shown on his bill as $22 an hour for field crew, $15 for services of engineer and $12 an hour for drafting. His testimony was comprised of nine pages. We affirm this award of $577.

Lavelle Nunn, called as defendant's witness, testified his occupation was that of photographer and

that he took 45 pictures of the church and some comparables; that his bill for photographs was $644 and for testifying $100. The lower court awarded him $744.80. Plaintiff objected to the quantity of photographs and the charges therefor, as well as the fee for testifying. We agree with plaintiff's counsel that the number of photographs introduced into evidence was excessive. Since Nunn did not qualify as an expert and expressed no expert opinion he is not entitled to witness fees under Louisiana Revised Statutes 13:3666. We know of no law nor have we been cited to any providing for assessing as costs the amount charged for photographs.

Don Barron, a commercial building contractor called as a witness for defendant and qualified as an expert, testified he had built schools, telephone buildings, and two or three churches. He estimated the cost of reproduction would be $274,420. This witness' itemized statement of charges, which was addressed to defendant's attorney and offered in evidence, reflects $655.10 for time spent estimating cost of reconstruction and $250 as witness fee for one day in court. However, he was unable to say how much time he actually spent in making this estimate as other members of his crew worked on it. The court awarded $805.10. Barron's testimony required ten pages of the record. We find this fee should be reduced to $300, which includes $100 for testifying in court.

Thomas R. Terral, a general contractor accepted as an expert, testified he and some of his employees estimated the cost of replacing the educational building and auditorium of the church. This witness submitted

a bill for these services in the amount of $858.20, which included travel time for himself and two or three of his employees, plus miscellaneous office expenses and $250 for testifying in court. His testimony comprises four and one-half pages of transcript. The trial judge awarded the total amount charged as expert witness fees, which we find excessive and it is therefore reduced to $300, which includes $100 for testifying.

Defendant placed in evidence the statements of charges of two other contractors, A. Ray Bond and Wesley Prestridge, which charges were $300 and $350 respectively. Neither of these prospective witnesses testified, it being stipulated that if they were called their testimony would be essentially the same as that of Thomas R. Terral. However, plaintiff objected to the introduction of the bills into evidence. The court awarded fees to these contractors in the amounts shown in their statements. Since we have no evidence of time spent in making these appraisals and neither Bond nor Prestridge testified, we find there should be no award of expert witness fees. See La. R.S. 13:3666.

Joe Simmons was accepted by the court as a "sound" expert, over objection of plaintiff who cross-examined the witness and determined that Simmons was not an engineer and had never made a "traffic noise" test before this one. The trial judge allowed the witness to testify and stated the objection would go to the weight and not to the "admissibility" of the testimony. This witness testified at length as to various sound tests, made over a period of three days, and television tapes which were made to show the relative positions from which the audio tests were made; further, he gave the

readings in "decibels" and testified that if the road was eventually widened to the edge of the right-of-way taken, the paved portion would be 18 feet from the front door of the church; that the present sound level at that distance would increase approximately ten decibles over the present reading; and he estimated the sound inside the church would rise to the upper level of speech sound or 80 decibels, which in his opinion would interfere with church activities. However, he could not project what proportionate increase there would be in the decibel count if the pavement were widened only 14 feet, the proposed width of the new construction, which would reduce the space between the edge of the pavement and the church from 61.9 to 47.4 feet. Simmons' testimony consumed approximately 46 pages of transcript. His bill for his services, which included furnishing sound and television equipment for the tests, was $500, $225 per day for court appearance, and $125 for replaying audio and television tapes in the court room, or a total of $850. We find this fee was excessive and reduce it to $550, representing $400 for preparation for trial and $150 for testifying.

It was stipulated between counsel that if Lauren Willett were called he would testify that he assisted Simmons in making the traffic count while the sound of traffic was being recorded. For this he submitted a bill for $225 for one day. This charge was allowed by the court. We find this award should be disallowed under La. R.S. 13:3666 and cases annotated thereunder.

For the reasons assigned the judgment of the lower court is amended to reduce the award to defendant,

United Pentecostal Church of Hodge, Louisiana, and against plaintiff State of Louisiana, through Department of Highways to $25,629.14, less a credit of $3,-632.00 previously paid, leaving a balance of $21,997.14, which amount is for the following items:

Land taken	$ 3,279.14
Improvements taken	2,350.00
Severance damage	20,000.00
	$25,629.14

The judgment is further amended to fix the expert witness fees as follows:

Hab Monsur	$ 650.00
Darrel Willett	650.00
H. L. Bass	250.00
O. L. Jordan	250.00
Richard Crawford	577.00
Don Barron	300.00
Thomas R. Terral	300.00
Joe Simmons	550.00
	$3,527.00

As amended, the judgment is affirmed.

COURT OF APPEAL
Second Circuit
State of Louisiana

Office of the Clerk, Shreveport, Louisiana. July 1, 1975

As counsel of record in the captioned case, you are hereby notified that the application or applications for rehearing filed by Defendant-Appellee have this day been Refused, En Banc. Bolin, Price, Hall, Dennis & Morris, JJ.
State, Dept. Hiways versus United Pentecostal Church.
Docket No. 12,550

Comments (if any were given by the Court):

Sincerely,
Harold L. Booth
Clerk of Court

cc: Fruge & Foret, Attys.
131 Court Street
Ville Platte, La. 70586

Johnie E. Branch, Jr., Atty
P. O. Box 44245, Capitol Station
Baton Rouge, La. 70804

Holloway, Baker, Culpepper & Brunson, Attys.
P. O. Box E
Jonesboro, Louisiana 71251

SUPREME COURT OF LOUISIANA
New Orleans, 70112

September 19, 1975

STATE OF LOUISIANA, THROUGH
THE DEPT. OF HIGHWAYS

versus No. 56,662

UNITED PENTECOSTAL CHURCH OF
HODGE, LOUISIANA

In re: United Pentecostal Church of Hodge, La. applying for certiorari, or writ of review, to the Court of Appeal, Second Circuit, Parish of Jackson

Application denied; there is no error in the judgment of the court of appeal.

/s/ JAD
/s/ JWS
/s/ AT JR
/s/ PFC

BOLIN, J., takes no part.

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
September 19, 1975

/s/ Phil Trice
Deputy Clerk

STATE OF LOUISIANA, THROUGH THE
DEPARTMENT OF HIGHWAYS

VS. NO. 14,667

MALCOLM D. WHITMAN

SECOND JUDICIAL DISTRICT COURT
PARISH OF JACKSON
STATE OF LOUISIANA

REASONS FOR JUDGMENT

This is another of numerous expropriation suits filed by the State of Louisiana, through the Department of Highways for the four-laning of U.S. Highway 167 between the Town of Jonesboro, Louisiana, and the Village of Hodge, Louisiana.

The property owned by the defendant in this case, Malcolm D. Whitman, is situated at the northwest corner of the intersection of Cooper Avenue and Pershing Highway, or U.S. Highway No. 167, and within the corporate limits of the Town of Jonesboro.

The defendant contends that his lot has a depth on the easterly side of approximately one hundred thirty-six feet, a depth of approximately one hundred twenty feet along its westerly side, a frontage of approximately one hundred feet along U.S. Highway 167, and a rear width of ninety-four feet.

It is the Department's contention that the defendant's property does not have the depth as contended by him, it contending that the Department has a right of way which extends beyond the travelled portion of the highway. However, upon the trial of this matter, there

was no evidence offered by the Department that shows the right of way to be other than the paved portion of the highway.

As compensation for the value of the land and the improvements taken by the Department from the defendant, it deposited into the Registry of the Court the sum of Three Thousand Nine Hundred Seventy-five and No/100 ($3,975.00) Dollars. At the trial, the experts employed by the plaintiff testified that One Thousand Five Hundred and No/100 ($1,500.00) Dollars of this amount was for the building situated on the subject property. It will have to be torn down or moved as the result of the taking.

All parties to this proceeding agree that the highest and best use of the land owned by the defendant, and the subject of this litigation, is commercial. However, as the record will reflect, there is a considerable difference between the evaluation placed on the improvements situated upon the property by the experts for the plaintiff and by the experts for the defendant. It was the contention of the experts who testified for the plaintiff that, because of the deteriorated condition of the improvements situated upon the property, and, because they considered the highest and best use of the property to be commercial, the improvements had a value for salvage only, and the building was valued at One Thousand Five Hundred and No/100 ($1,500.00) Dollars.

On the other hand, the experts for the defendant testified that the improvements situated upon the property, consisting of a frame building containing

three apartments, had a value of a much greater amount, this amount being about Seventeen Thousand and No/100 ($17,000.00) Dollars, depreciated value, upward.

According to the highway survey, which shows that it has assumed that its right of way extends beyond the travelled portion of the highway, the lot owned by the defendant contained a total of 10,270.9 square feet in area. However, the survey filed by the defendant shows that the amount of property owned by the defendant is comprised of 12,452 square feet. Also it is the Department's contention that it has taken only 1,860 square feet approximately, of the defendant's property. However, as discussed previously, it is the defendant's contention that the plaintiff has actual taken 4,132 square feet of his property. This being comprised of the 1,860 square feet contended for by the plaintiff, plus the area between this 1,860 square feet and the travelled portion of the highway.

This Court has made the following findings and conclusions regarding this litigation:

1. The property taken by the Highway consists of 4,132 square feet with a value of One and 75/100 ($1.75) Dollars per square foot, and with a total value of Seven Thousand Two Hundred Thirty-one and No/100 ($7,231.00) Dollars;

2. The value of the land, before the taking, was Seventeen Thousand Nine Hundred Seventy-two and 50/100 ($17,972.50) Dollars;

3. The value of the land after the taking, Twelve Thousand Five Hundred Eighty and 75/100 ($12,580.75) Dollars, or a severance damage to the remaining property of Five Thousand Three Hundred Ninety-one and 75/100 ($5,391.75) Dollars, the same representing a depreciation of approximately thirty (30%) per cent;

4. Depreciated value of the structure situated upon the subject property, prior to the taking, has been determined by the Court to be Fifteen Thousand and No/100 ($15,000.00) Dollars.

Therefore, it is this Court's opinion that the defendant in these proceedings is entitled to the sum of Twenty-seven Thousand Six Hundred Twenty-two and 18/100 ($27,622.18) Dollars as compensation due him for the taking, less a credit, of course, for the amount already deposited into the Court and for all costs of these proceedings, except for such costs from which the Department is specifically exempted by law from having to pay.

The expert witness fees for the defendant are fixed in the amount as testified to by them in Court for the preparation and trial of this case and are hereby taxed as costs.

THUS DONE AND SIGNED on this the 26 day of June, 1974

/s/ DAVID T. CALDWELL
JUDGE
SECOND JUDICIAL DISTRICT COURT
PARISH OF JACKSON
STATE OF LOUISIANA

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HIGHWAYS

VS. NO. 14,667

MALCOLM D. WHITMAN

SECOND JUDICIAL DISTRICT COURT
PARISH OF JACKSON
STATE OF LOUISIANA

JUDGMENT

This matter came for trial pursuant to regular assignment on June 26th, 1974.

Present: Robert L. Ledoux and Jack Held,
Attorneys for Plaintiff,
State of Louisiana, through the Department of Highways

and

William H. Baker, Attorney for defendant,
Malcolm D. Whitman

The Court after considering the stipulations and agreements of counsel, reviewing the documentary evidence and considering the testimony of the witnesses produced at trial and considering the law and the evidence to be in favor of the defendant, MALCOLM D. WHITMAN, for written reasons rendered on the 26th day of June, 1974.

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the defendant, MALCOLM D. WHITMAN, and against the State of Louisiana, Through the Department of Highways, in the full and true sum of TWENTY SEVEN THOUSAND SIX HUNDRED TWENTY TWO AND 18/100 ($27,622.18) DOLLARS, subject to a credit of THREE THOUSAND NINE HUNDRED SEVENTY FIVE AND NO/100 ($3,975.00) DOLLARS, previously deposited by the State of Louisiana, through the Department of Highways and withdrawn by the defendant, Malcolm D. Whitman, without prejudice, per Court order, leaving a balance of TWENTY THREE THOUSAND SIX HUNDRED FORTY SEVEN AND 18/100 ($23,647.18) DOLLARS, together with legal interest thereon at the rate of 7% per annum from November 16th, 1973.

The above amount includes the following awards pursuant to the reasons for judgment, to-wit:

Land Taken	$ 7,231.00
Improvements Taken	15,000.00
Severance Damage	5,391.75
TOTAL	$27,622.18

In addition to the above amounts, the fees of the expert witnesses used by defendant are fixed as follows:

H. L. Bass	$1,800.00
Hab Monsur, Jr.	$1,950.00
Darrell V. Willett	$1,950.00
O. L. Jordan	$1,650.00
Richard Crawford	$ 375.00
Lavelle Nunn	$ 224.80
W. W. Prestridge	$ 500.00

and are taxed as cost of Court.

Plaintiff, State of Louisiana, through the Department of Highways, is cast with all costs herein, specifically including the expert witness fees but excluding any cost for which the State is exempted by statute from assessment.

JUDGMENT RENDERED on the 26th day of June, 1974, and READ, FILED AND SIGNED in Open Court on the 28th day of June, 1974, at Arcadia, Bienville Parish, Louisiana.

DAVID T. CALDWELL
JUDGE

ATTEST: A true and correct copy
of the original this JUN 28, 1974
/s/ H. RUPERT SLEDGE
Clerk of Court
Bienville Parish, La.

Judgment rendered June 3, 1975 Application for rehearing may be filed within the delay allowed by Art. 2166, LSA-CCP.

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

STATE OF LOUISIANA, through DEPARTMENT OF HIGHWAYS
Plaintiff-Appellant

versus NO. 12,551

MALCOLM D. WHITMAN
Defendant-Appellee

Appeal from the Second Judicial District Court
Parish of Jackson, State of Louisiana,
Hon. David T. Caldwell, Judge

D. Ross Banister;
William W. Irwin, Jr.;
Jerry F. Davis;
Robert L. Ledoux;
Johnie E. Branch, Jr.;
Jack C. Fruge', Sr.
by Jack C. Fruge'

Attorneys for Plaintiff-Appellant

Holloway, Baker,
Culpepper & Brunson
by William H. Baker and
Herman A. Castete

Attorneys for Defendant-Appellee

Before BOLIN, HALL and MORRIS, JJ.

By BOLIN, J.

Pursuant to Louisiana Revised Statutes 48:441 et seq., plaintiff Department of Highways expropriated a strip of land varying from 37 to 47 feet deep across the 100-foot front of a lot owned by defendant and situated on the corner of Cooper Avenue and U.S. Highway 167 in the Town of Jonesboro, Louisiana. As compensation for the land and the improvements taken, the Department of Highways deposited the sum of $3975 in the registry of the court. This sum represented an estimated value of $2475 for the land taken and $1500 as the salvage value of an old frame dwelling which was partially located in the proposed right-of-way. Defendant, being dissatisfied with the amount deposited in the registry of court, sought a judicial determination of the amount of compensation due him.

Following trial on the merits the judge, for written reasons assigned, found the property expropriated by the highway department consisted of 4132 square feet with a value of $1.75 per square foot, or a total value of $7231.00. The court further found severance damage to the remainder of defendant's lot in the sum of $5391.75 and the depreciated value of the frame dwelling to be $15,000. There was judgment in favor of defendant and against the Department of Highways for the total sum of $27,622.18, less a credit of $3975.00 previously deposited in the court, plus legal interest from November 16, 1973, and costs. In addition the fees of the expert witnesses used by defendant were fixed at $8449.80 and taxed as costs against the Department of Highways, which has appealed.

In this court defendant has filed a motion to dismiss the appeal. We overrule the motion to dismiss and amend the judgment by reducing the amount of the award to the landowner and reducing the amount fixed for the fees of the experts.

MOTION TO DISMISS

The motion to dismiss was predicated on the following grounds: (1) the petition for appeal was not signed by an attorney of record for plaintiff-appellant as provided by Louisiana Code of Civil Procedure Article 863; (2) appellant failed to deposit the additional amount awarded by the trial court; and (3) the transcript of testimony was not timely prepared and lodged before this court.

Answering the grounds set forth above in the order stated, we find:

(1) The petition for the appeal was properly signed. The primary purpose of Louisiana Code of Civil Procedure Articles 863 and 864 is to fix responsibility against an attorney in the event disciplinary action is necessary because of the filing of improper pleadings. Berglund v. F. W. Woolworth Co., 236 So. 2d 266 (La. App. 4th Cir. 1970). It is appropriate to point out that the petition for an appeal listed the attorneys of record for appellant and was signed on behalf of these record attorneys. Parenthetically it should also be added that appeals are favored in our law and may be taken by oral motions as well as written pleadings.

(2) In answer to the second ground, it is conceded plaintiff did not deposit the difference between the amount awarded and the amount previously deposited; however, in State, Department of Highways v. Holmes, 251 La. 607, 205 So. 2d 416 (1967), the court expressly held that the excess award was not required to be paid pending an appeal.

(3) We find no merit in the third ground since the failure to file the transcript was not imputable to plaintiff but, to the contrary, plaintiff made every effort to have the transcript filed in this court, which has been done.

MERITS

On the merits appellant sets forth the following specifications of error: (1) the lower court incorrectly calculated the amount of land expropriated for the highway right-of-way as 4132 square feet rather than 1860 square feet; (2) the lower court erred in placing a valuation on the improvements of $15,000 rather than $1,500; and (3) the amount of the fees fixed for the experts was excessive. In order to properly discuss and dispose of the errors alleged to have been committed by the trial judge it will be necessary to set forth the facts and general background of the case.

The property owned by defendant was a corner lot fronting on the main highway connecting Jonesboro and Hodge. It was bounded on one side by Cooper Street which was 80 feet wide. The property is near the Jonesboro-Hodge High School and because of its location it was conceded by all experts to be best suited for

use as commercial property. Located on the property was a large frame dwelling. The house was vacant at the time of trial and had not been occupied for approximately one year prior thereto. There was evidence the house contained three apartments which in the past had been rented as rooms or apartments to construction workers. However, it had never been used for purely commercial purposes nor was it suitable for such use. Because the highway right-of-way would take a portion of the house it was conceded by plaintiff and defendant that this would necessitate a total taking of the improvement.

Directing our attention next to the question of the amount of defendant's land taken, plaintiff relies on a plat of survey prepared by one of its engineers which depicts the right-of-way before the taking as extending beyond the paved portion of the highway. According to this plat the amount of defendant's land to be expropriated for the right-of-way would be only 1860 square feet. Opposed to this defendant offered the testimony of Richard Crawford, a registered land surveyor, who testified he had examined the public records and had found no recorded plat or instrument showing the highway department owned any property beyond the paved portion of the road. Crawford's survey showed the amount of land necessary for the construction of the highway would be 4132 square feet. Since plaintiff has not shown it owned any land beyond the paved portion of the highway, we conclude the area expropriated was 4132 square feet rather than 1860 square feet.

The second and most perplexing question for consideration is the proper amount to be awarded the landowner for the loss of the frame dwelling located on the property. Two experts testified for plaintiff that the highest and best use of the property was for commercial purposes. These witnesses were further of the opinion that the dwelling did not enhance the value of the property, if it were to be utilized for commercial purposes, and they therefore evaluated the improvements at only $1,500, the amount for which the house could be sold for salvage and removed. In other words, these witnesses thought the property would be worth more with the house off the land than on it.

Several appraisers testified for defendant and each of them thought the highest and best use for the entire property was for commercial purposes. They calculated the total value by giving a square foot value of the entire land and apportioning this total amount to the part actually taken for the right-of-way. They determined severance damage by depreciating the value of the balance of the land at 50% because it had been damaged by being reduced in size. Each of these witnesses calculated the value of the improvements on the basis of reproduction cost less depreciation. The depreciated cost of the building was then added to the value of the land taken plus the severance damage to arrive at an award for the landowner. While these witnesses testified the frame dwelling could have been used as rental property or possibly as a beauty shop or liquor store or some other similar light commercial purpose, they did not testify as to any definite amount the improvement would enhance the value of the property for commercial purposes.

Our law requires that just and adequate compensation be paid for property taken for public purposes. A just and adequate compensation is the actual market value of the particular portion of property taken, valued according to its highest and best use, together with any severance damage caused to the remaining property. State through Department of Highways v. Hoyt, 284 So. 763 (La. 1973) and cases cited therein.

The highest and best use of the subject property is conceded to be commercial. There was some variance in the square foot value but the trial judge adopted a figure of $1.75 per square foot and we find this evaluation is supported by the record. Having previously found the lower court was correct in finding plaintiff expropriated 4132 square feet for the highway right-of-way, we find that portion of the judgment awarding defendant $7,231 for the land actually taken to be correct.

We accept as correct the statement of the trial judge that the total area in the tract owned by defendant was 12,452 square feet before the taking. Therefore, the remainder after the expropriation of 4132 square feet was comprised of 8320 square feet. Assigning to this area a square foot value of $1.75, we find the remainder had a value of $14,560 prior to the taking. We agree with the trial judge the property suffered 30% depreciation because of its reduction in size and limited use as commercial property; therefore we allow $4,368 as severance damage to the remainder, leaving defendant owning a lot worth $10,192.

While no one testified as to any exact amount, it can reasonably be assumed that if the property had been appraised for residential purposes the value of the remaining property would have been negligible as compared to $10,192.00. For this reason it appears to us to be patently unfair for the property owner to recover for a residence located on property which was valued for commercial use. We find the only sound basis for fixing the value of the improvements on this property, if it were to be utilized for commercial purposes, is its salvage value, which is $1,500. Defendant vigorously questions this method of calculating the award, arguing that the expropriating authority has in effect taken the entire frame dwelling since it was in the right-of-way and is only paying $1,500 for the structure. We must confess this is a persuasive argument. However, the purpose of fixing an award in expropriation cases is to pay the landowner the market value of the property taken plus severance damage, and also to as nearly as possible adequately compensate the landowner for any loss or damage suffered by him. Viewing the overall situation we think paying the landowner only the salvage value of the improvements will accomplish this result.

As result of our finding the landowner will receive $7,231 for the land taken, $4,368 as severance damages, and $1,500 for the salvage value of his frame dwelling, or a total of $13,099, and he will retain the ownership of a piece of commercial property valued at $10,192. If the depreciated cost of the dwelling were added to this figure we are of the opinion the landowner would receive payment for a loss which he did not suffer. Our conclusion on this portion of the case is fortified by the

rationale expressed in State through Department of Highways v. Goldberg, 223 So. 2d 174 (La. App. 3d Cir. 1969).

EXPERT WITNESS FEES

We next consider the issue of whether the award of expert witness fees was excessive. We are aware of the jurisprudential rule that in fixing the fee to be awarded an expert witness much discretion is granted to the trial judge. However, from our painstaking review of this record we are constrained to find the expert witness fees were fixed at such an excessive amount as to constitute an abuse of this discretion.

The following fees were fixed by the trial judge and assessed as costs against the Department of Highways:

H. L. Bass	$1800.00
Hab Monsur, Jr.	1950.00
Darrell V. Willett	1950.00
O. L. Jordan	1650.00
Richard Crawford	375.00
Lavelle Nunn	224.80
W. W. Prestridge	500.00
	$8449.80

Preliminary to a consideration and discussion of each of the fees fixed and listed above, we deem it appropriate to set forth several pertinent principles of law. The amount agreed upon between an expert witness and the party calling him is not a criterion as

to the amount to be taxed as costs. See Daigle v. Hardware Dealers Mutual Fire Insurance Company, 165 So. 2d 643 (La. App. 1st Cir. 1964); State of Louisiana, through Department of Highways v. Smith, 270 So. 2d 178 (La. App. 1st Cir. 1972); State of Louisiana, through Department of Highways v. Hoyt, 272 So. 2d 768 (1972).

The defendant can have taxed as court costs the reasonable cost of time spent by the expert in gathering facts necessary for his testimony but not for time spent in consultation which only assists the attorney in preparation for the litigation. Cox v. East Baton Rouge Parish School Board, 165 So. 2d 667 (La. App. 1st Cir. 1964), citing a long line of jurisprudence. In State v. LaBauve, 75 So. 2d 862 (La. App. 1st Cir. 1954) it was held a court will only award expert witness fees when the witness is in court testifying or in court waiting to be called to testify, and expert witness fees will not be awarded to an expert after he has testified, even though he stays in court only for the purpose of consulting the party who summoned him.

H. L. Bass, called as expert witness for defendant as an appraiser, testified he went to the subject property and to the comparables, identification of which he obtained by going to the courthouse. He testified he spent four days examining the records in the course of which he checked and examined about 30 sales. If comparable, he would view the property to compare the location and size with that of the Whitman property. The direct and cross-examination of Mr. Bass consumed approximately 27 pages of the transcript and the major part of this testimony was devoted to the manner in which he appraised the house with particular attention to reproduction costs and depreciation. Although Mr. Bass stated he had spent two days in court, for which he charged $150 a day, we are unable to find that he attended as a witness more than one day. We further find the charge of $1500 for preparation of his report from which he testified is excessive. He gave no estimate of the hours he spent in actually preparing his appraisal, nor has he submitted a schedule of his charges either by the hour or by the day. Thus we must ascertain what is reasonable under the facts and circumstances of the particular case. We estimate Mr. Bass spent approximately seven days preparing this appraisal, for which he should receive $100 a day plus $150 for his time spent in testifying, or a total of $850.

Hab Monsur, Jr., qualified as an expert appraiser, testified in general much in the same vein as Mr. Bass, although he spent much less time in arriving at his conclusions. His testimony comprised nine pages of the transcript and, although reflecting considerable knowledge of property values in the area of the subject property, gave no indication of the amount of time he spent in preparing an appraisal. In view of the short time he was on the stand and the fact that his appraisal was based largely on his understanding of real estate values rather than on time spent specifically on this particular appraisal, we find an expert witness fee of $500 would adequately compensate him for his time.

It was stipulated between counsel that if appraiser Darrell Willett were called his testimony would be essentially the same as the other three appraisers who testified for defendant. No written appraisal nor

schedule of time consumed by this witness was submitted. Counsel for defendant stated that Willett's charge for his appraisal was $1500 and that his charge for court appearance was $225 per day for the two days he was available for testifying. The court awarded this witness $1950, which we consider excessive inasmuch as any testimony he might have given would have been merely cumulative and of little or no value to the court in arriving at the amount of just compensation to be awarded defendant. As stated earlier, an appraiser's charge to his client for aid in preparation for trial is not the criterion for assessing witness fees. Since we have only the stipulation that Willett would testify the same as defendant's other expert appraisers, we conclude a fee of $250 should be fixed for this expert.

O. L. Jordan, another appraiser qualified as an expert, testified he spent two days inspecting the property, drawing a plat, examining records and estimating reproduction cost of the building. He testified his fee was $1200 for the appraisal and $225 per day in court. His testimony comprised nine pages of transcript. He stated he had been in court two days but it is apparent from the record and the length of time he testified that he spent no more than two hours on the witness stand. We find the award of $1650 to this witness is excessive and it is reduced to $500.

Richard E. Crawford, called by defendant, was qualified as an expert and a registered land surveyor. He testified he made the survey of the property and searched the records of Jackson Parish but was unable to find any right-of-way agreements or deeds in the

area to the highway department. His survey led to the conclusion by the court, undisputed by plaintiff, that the area lying between the edge of the pavement and the "taking line" was comprised of 4132 square feet rather than 1860 square feet as found by the highway department. His testimony consumed only four pages of the transcript and consisted primarily of recitation of his qualifications. The lower court fixed the fee of this witness at $375 which we find excessive and it is reduced to $150 for the survey and $100 for his time in testifying, or a total of $250.

Lavelle Nunn, called as defendant's witness, testified his occupation was that of photographer; that he charged $124 for photographs made in connection with this lawsuit; and that his fee was $100 a day for court attendance. His testimony was comprised of one and one-half pages of the transcript and was strictly for identification of the photographs taken by him on two different occasions. The statement for $124 reflects the pictures were ordered by H. L. Bass, a real estate appraiser for defendant. The court awarded the full amount of $224 as fee for this witness, which we conclude was improper and should be disallowed. In State of Louisiana through Department of Highways v. Bates, 129 So. 2d 550 (La. App. 1st Cir. 1961) the court held that the charge of the photographer for pictures taken by a studio was improper and was not a service contemplated by Louisiana Revised Statutes 13:3666 and should not be allowed.

The trial court fixed a fee of $500 for W. W. Prestridge, a building contractor with no particular expertise in that field except experience. His

testimony consumed four pages, two of which were used for qualifying him as an expert and two for relating his estimate of reproduction cost for the structure on the property. Since we have previously found reproduction cost is not a valid method of determining the amount to be awarded as just compensation for property whose highest and best use had been determined to be commercial, we find this testimony was of little use to the court and is excessive; therefore, we reduce the award to $100.

We recapitulate the amount of the witness fees fixed by this court as follows:

H. L. Bass	$ 850.00
Hab Monsur, Jr.	500.00
Darrell Willett	250.00
O. L. Jordan	500.00
Richard Crawford	250.00
W. W. Prestridge	100.00
	$2450.00

For the reasons assigned the judgment of the lower court is amended to reduce the award to the landowner, Malcolm D. Whitman, and against plaintiff Department of Highways to $13,099.00, less a credit of $3,975.00 previously paid, leaving a balance of $9,-124.00; the judgment is further amended to reduce the amount of fees fixed for the expert witnesses used by the defendant from the total sum of $8,449.80 to $2,-450.00. As amended, the judgment is affirmed.

COURT OF APPEAL
Second Circuit
State of Louisiana

Office of the Clerk, Shreveport, Louisiana, July 1, 1975.

As counsel of record in the captioned case, you are hereby notified that the application or applications for rehearing filed by Defendant-Appellee, have this day been Refused, En Banc., Bolin, Price, Hall, Dennis & Morris, JJ.
State, Dept. Hiways versus Malcolm D. Whitman
Docket No. 12,551

Comments (if any were given by the Court):

Sincerely,
Harold L. Booth
Clerk of Court

cc: Fruge & Foret, Attys.
131 Court Street
Ville Platte, La. 70586

Johnie E. Branch, Jr., Atty.
P. O. Box 44245, Capitol Station
Baton Rouge, La. 70804

Holloway, Baker, Culpepper & Brunson, Attys.
P. O. Box E
Jonesboro, Louisiana 71251

SUPREME COURT OF LOUISIANA
New Orleans, 70112

September 25, 1975

STATE OF LOUISIANA THROUGH THE
DEPARTMENT OF HIGHWAYS

versus No. 56,663

MALCOLM D. WHITMAN

In re: Malcolm D. Whitman applying for certiorari, or writ of review, to the Court of Appeal, Second Circuit, Parish of Jackson

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Writ denied. There is no error of law in the judgment complained of.

/s/ PFC
/s/ JWS
/s/ JAD
/s/ WFM

SUMMERS, J., is of the opinion the writ should be granted.

BOLIN, J., recused.

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
September 25, 1975

/s/ Phil Trice
Deputy Clerk